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No. 92-2003

In the Supreme Court of the United States

OCTOBER TERM, 1993

TIMES PUBLISHING COMPANY, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment requires the district court to unseal motions and transcripts of closed pretrial bench conferences because the court did not give notice of the possibility of closure until after the conferences took place and the motions were filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 987 F.2d 708. The order of the district court (Pet. App. 16a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1993. The petition for a writ of certiorari was filed on June 15, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1992, Charles Corces (a Florida defense attorney) and John Valenti (a state prosecutor) were indicted in the United States District Court for the Middle District of Florida on conspiracy, extortion, and bribery charges.[1] In the pretrial stage of the criminal case, the district court held a number of *ex parte* discussions with the prosecutor and closed bench conferences with counsel for one or more of the parties. The court closed those proceedings because of its agreement with the government's submission that open hearings would lead to the disclosure of confidential information regarding ongoing criminal investigations. In addition, the court directed that certain of the conferences be noted not on the public docket but instead on a separate, sealed docket. Pet. App. 2a-5a, 9a; see Gov't C.A. Br. 2-4.

2. On October 23, 1992, the day after the last of the closed conferences, petitioner filed an emergency motion seeking permission to intervene and asking the court to unseal the closed records. The district court held prompt hearings on October 23 and October 28, 1992, and issued an order on November 6, 1992, which rejected petitioner's request for access to records of several of the conferences. Pet. App. 16a-23a. The court stated that all but one of the proceedings that it declined to disclose involved discussions of ongoing law enforcement investigations. *Id.* at 19a-21a.[2] The court noted the "common law and constitutional right of the public * * * to have access to judicial proceedings," but explained that "exposure of those proceedings will result in a substantial probability of irreparable damage to a compelling

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[1] Valenti pleaded guilty in April 1992. See Gov't C.A. Br. 3.

[2] The court refused disclosure of the final proceeding under 18 U.S.C. 3153(c)(1). Pet. App. 22a.

interest (i.e., protection of continuing law enforcement investigations)," and "that the alternative to closure will not adequately protect that interest." *Id.* at 21a-22a. Finally, the district court ruled that future proceedings should be noted on the public docket. *Id.* at 22a-23a.

3. The court of appeals affirmed the district court's decision not to disclose the proceedings the district court had ordered sealed. Pet. App. 1a-15a. The court started from the premise that a court may restrict access to criminal proceedings only if it gives notice and an opportunity to be heard on the closure, and if it articulates specific "findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 8a (quoting *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*)). The court, however, rejected petitioner's argument that *Press-Enterprise I* requires a trial court to make those findings "*before* a closed bench conference occurs," Pet. App. 9a, noting that the district court here afforded petitioner "an opportunity to be heard on the release of the transcripts within a reasonable time," *id.* at 11a.

The court of appeals then considered the district court's holding that it was inappropriate to release the transcripts at this time. Pet. App. 11a-13a. The court recognized that "denial of access [is permissible only if it] is necessary to preserve higher values, and is narrowly tailored to serve that interest." *Id.* at 12a. Applying that standard, the court concluded, based on its review of the sealed motions and transcripts, that the district court's refusal to unseal the materials was "a necessary means to achieving the government's compelling interest in the protection of a continuing law enforcement investigation." *Id.* at 13a. The court also noted that petitioner had failed to suggest a "logical and workable alternative" for consideration by the district court

or the court of appeals. *Ibid.*[3] The court did note, however, that petitioner "is not precluded from making a subsequent motion to unseal * * * due to changed circumstances in the ongoing law enforcement investigation." *Id.* at 13a n.3.

The court of appeals also disapproved of the district court's practice of maintaining a sealed docket and noting closed proceedings on the sealed docket sheet. Pet. App. 14a-15a. The court noted that "the sealed docket completely hid from public view the occurrence of closed pretrial bench conferences and the filing of *in camera* pretrial motions," a result the court found "inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings." *Id.* at 14a.

ARGUMENT

Petitioner contends (Pet. 13-28) that the court of appeals erred in holding that it is permissible for a district court to seal pretrial motions and hold closed pretrial bench conferences without prior notice to the public. Petitioner does not ask this Court to review the findings of the lower courts that release of the materials it seeks would have prejudiced an ongoing criminal investigation, and that those findings were an adequate basis for sealing motions and closing bench conferences. See Pet. 26 & n.11. Accordingly, the case must proceed in this Court on the premise that those findings were correct. Hence, the most petitioner can claim is that because the district court noted those matters on a sealed docket sheet and did not give advance public notice that it planned to hold closed conferences, the court must un-

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[3] The court of appeals specifically found "that the release of a redacted version of the transcripts would have been inadequate to protect the government's interest in the ongoing investigation." Pet. App. 13a.

seal the motions and transcripts at this time. That narrow procedural claim is incorrect and does not merit review by this Court. It would be highly inappropriate to require the district court to unseal documents that properly should have been sealed solely because of a failure on the part of the district court to make the requisite determinations at the appropriate time. Petitioner does not suggest that any court has countenanced such an extraordinary remedy.[4] Accordingly, there is no basis for this Court to consider such a claim at this time.

For similar reasons, petitioner errs in arguing (Pet. 19-20) that the decision of the court of appeals conflicts with decisions of other courts of appeals. None of those courts has considered the unusual question presented by the petition: whether a court should order the release of properly sealed documents as a remedy for improper procedures in determining the propriety of closure in the first instance. Moreover, it is not clear that any of those courts would require procedures any more burdensome than the open-docket requirement imposed by the court of appeals in this case.[5]

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[4] Other appellate courts that have concluded that district courts failed to follow proper procedures before closure have not automatically ordered disclosure, but rather have remanded the cases to require the district court to hold an after-the-fact hearing. See, *e.g.*, *The Washington Post* v. *Robinson*, 935 F.2d 282, 290, 292 (D.C. Cir. 1991); *In re Washington Post Co.*, 807 F.2d 383, 393 (4th Cir. 1986). Because the district court already has conducted such a hearing in this case, and because the petition does not seek review of the procedures followed at the after-the-fact hearing, the court of appeals correctly declined to order such a remand here.

[5] See *The Washington Post* v. *Robinson*, 935 F.2d 282, 288-289 (D.C. Cir. 1991) (sufficient notice to the press and public if the government filed a motion to seal a plea agreement and notice of that motion was entered on the public docket, even if the plea agreement remained under seal pending disposition of the motion); *In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986)

To be sure, the documents petitioner seeks were kept off the public record without the prior notice required by the courts on whose decisions petitioner relies, but that does not establish a conflict among the circuits, because the Eleventh Circuit itself now requires the same advance notice that has been required by other courts of appeals. Because district courts in the Eleventh Circuit have been directed to maintain open dockets in the future, there is little basis for believing that similar problems will arise in subsequent Eleventh Circuit cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1993

(sufficient notice to close plea and sentencing hearings for national security reasons if the motion to close was noted on the public docket); *In re Herald Co.*, 734 F.2d 93, 102-103 (2d Cir. 1984) ("We think [prompt notice on the public docket] suffices to afford an adequate opportunity for challenge to courtroom closure."); *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 475-476 (6th Cir. 1983) ("[T]he most reasonable approach would be to require that motions to seal be docketed with the clerk of the district court."); *United States* v. *Brooklier*, 685 F.2d 1162, 1168 (9th Cir. 1982); *United States* v. *Criden*, 675 F.2d 550, 559 (3d Cir. 1982) (requiring public docketing a reasonable time before closure of hearing).